

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

IMPACT JOURNALS, LLC,
6666 East Quaker Street, Suite 1
Orchard Park, NY 14127

Plaintiff,

v.

**UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES,**
200 Independence Avenue, SW
Washington, DC 20201

Defendant.

Case No. 19-3582

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiff Impact Journals, LLC (“Impact Journals”) seeks declaratory and injunctive relief to remedy violations of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, by Defendant United States Department of Health and Human Services (“HHS”) acting through the U.S. National Library of Medicine (“NLM”) at the National Institutes of Health (“NIH”) (collectively, “Defendant”). Defendant violated FOIA when it (i) improperly withheld responsive records from all relevant government officials and time periods, and (ii) failed to respond to Plaintiff’s appeal of its determination within twenty working days.

PARTIES

2. Plaintiff Impact Journals is a New York Limited Liability Company with its principal place of business in New York. Impact Journals is the publisher of *Oncotarget*, a peer-reviewed bio-medical journal covering research on all aspects of oncology. On October 7, 2019 two members of the *Oncotarget* Editorial Board, William G. Kaelin and Gregg L. Semenza, were

awarded The Nobel Prize in Physiology or Medicine 2019.

3. Defendant United States Department of Health and Human Services is an “agency” within the meaning of 5 U.S.C. § 552(f)(1), and is headquartered in Washington, D.C. The National Institutes of Health is a part of HHS and maintains the U.S. National Library of Medicine. Defendant is in possession, custody, and control of certain public records to which Impact Journals sought access under FOIA, and that are the subject of this action.

4. Plaintiff has standing because it submitted a Request for Information under FOIA on November 5, 2018, which Defendant acknowledged and assigned FOIA Case Number 19-FOI-00053-NLM (the “FOIA Request”), but received an incomplete response. Plaintiff detailed Defendant’s deficient response in its Appeal sent within the applicable 90-day time period, 45 C.F.R. § 5.52, and acknowledged by Defendant on February 28, 2019 (assigned Appeal Case Number 19-0045-AA; the “FOIA Appeal”). Plaintiff received no further response. Because Defendant failed to “make a determination with respect to [Plaintiff’s] appeal within twenty days,” 5 U.S.C. § 552(a)(6)(A)(ii), Plaintiff is “deemed to have exhausted its administrative remedies with respect to [its] request.” *Id.* § 552(a)(6)(C)(i); *see also Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57, 62 (D.C. Cir. 1990).

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action under 5 U.S.C. § 552(a)(4)(B), and 28 U.S.C. §§ 1361, 2201(a), and 2202.

6. This Court has personal jurisdiction over Defendant under 28 U.S.C. § 1331.

7. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

LEGAL BACKGROUND

8. “FOIA requires the government to disclose, upon request, broad classes of

documents identified in 5 U.S.C. § 552(a),” unless the documents are exempted under 5 U.S.C. § 552(b). *Prison Legal News v. Samuels*, 787 F.3d 1142, 1146 (D.C. Cir. 2015).

9. An agency must locate and “promptly” make available requested records, 5 U.S.C. § 552(a)(3)(A), (a)(6)(C)(i), unless it can establish that it lawfully may withhold records, or portions of records, under narrowly defined FOIA exemptions in § 552(b). Notably, Defendant did not claim it withheld documents under any FOIA exemption.

10. When an agency fails to make a timely determination with respect to a perfected FOIA request or appeal, a requester has exhausted its administrative remedies with respect to the request. 5 U.S.C. § 552(a)(6)(C)(i); *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm’n*, 711 F.3d 180, 186 (D.C. Cir. 2013).

11. This Court may enjoin an agency from improperly withholding records and order the production of such documents under 5 U.S.C. § 552(a)(4)(B).

12. This Court also may award attorney fees and litigation costs under 5 U.S.C. § 552(a)(4)(E).

FACTUAL BACKGROUND

13. In 2010, *Oncotarget* was selected to be included in MEDLINE, the “premier” bibliographic database operated by the U.S. National Library of Medicine (“NLM”). MEDLINE is an important resource for biomedical researchers and academics across the world because it indexes journals by a unique Medical Subject Heading (“MeSH”) identifier, which is a powerful search tool researchers use to improve the quality of a search for articles relevant to their work. Scientific biomedical journals like *Oncotarget* strive to be indexed on MEDLINE because researchers will discover their articles more easily, and authors are more likely to submit their research for peer-review and possible publication.

14. On August 7, 2017, after nearly seven years of successful indexing on MEDLINE, NLM abruptly notified *Oncotarget* that NLM decided to stop indexing the journal. *Oncotarget* was not given notice that it was selected for review, was not provided any justification regarding why it was selected, was not even allowed to complete its own review application (NLM staff unilaterally completed the application, which resulted in errors on the application itself), and was not given an opportunity to supplement “its” review application.

15. NLM uses the Literature Selection Technical Review Committee (LSTRC), a federal advisory committee, to review and recommend journals to be included on MEDLINE. The LSTRC makes a recommendation to NLM, which the agency can accept or reject. The NIH Director reviews and approves NLM’s decision. Despite stating that *Oncotarget* “continues to play a major role in the publication of important basic science research papers,” and that its “editorial practices are consistently high . . . [and] ethical guidelines are consistently followed,” the LSTRC inexplicably divined that the journal’s “overall appraisal” fell just below its required arbitrary threshold and recommended that *Oncotarget* be removed from MEDLINE.

The FOIA Request

16. On November 5, 2018, Impact Journals, through its attorneys and on behalf of *Oncotarget*, submitted to Defendant a “Request for Information regarding LSTRC Review” under FOIA, attached as **Exhibit A**.

17. The FOIA Request asked for copies of documents “relating to LSTRC’s review and recommendation, and NLM’s decision, to deselect *Oncotarget* from MEDLINE.” In particular, the FOIA Request sought:

- (i) written communications and documents from LSTRC to NLM regarding (a) “its recommendation to deslect *Oncotarget*” and (b) “how it derived at *Oncotarget*’s numeric overall rating score of 3.5,” and

(ii) “[a]ny document(s) (*e.g.* letters, emails, or memorandum) LSTRC or NLM maintains regarding its selection or deselection decision of Oncotarget [sic] from MEDLINE/PubMED.”

18. NLM did not respond to the FOIA Request until January 14, 2019. NLM stated in its cover letter, attached as **Exhibit B**, that its response and included production was “final.” NLM did not assert it withheld documents under a FOIA exemption. NLM’s response to the FOIA request, however, was incomplete, indicating that NLM conducted an inadequate search for responsive records.

The FOIA Appeal

19. On February 27, 2019, Impact Journals timely submitted an appeal challenging the deficiencies with NLM’s response to the FOIA Request, attached as **Exhibit C**. Defendant acknowledged the FOIA Appeal on February 28, 2019, attached as **Exhibit D**, assigning it Appeal Case No. 19-0045-AA.

20. Impact Journals explained in its FOIA Appeal that “[c]oncrete evidence exists that the agency’s responses and production to several items from the Oncotarget FOIA Request are incomplete.”

21. NLM, for example, failed to produce reports or other written communications from nine of the 11 LSTRC members present at *Oncotarget*’s review; and “failed to produce anything that reconciles the ratings assigned in the individual reports with those [ultimately provided to *Oncotarget* by] the LSTRC.”

22. Impact Journal’s FOIA Appeal also explained how NLM failed to produce any documents or written communications to and from Ms. Joyce Backus, the Associate Director for Library Operations and the Designated Federal Officer for the LSTRC, despite Ms. Backus being present at the relevant LSTRC meeting and “all of the . . . Journal Review Team meetings during

the months leading up to the June 2017 LSTRC meeting.” Ms. Backus was heavily involved in the decision to remove *Oncotarget* from MEDLINE, and NLM’s failure to include any emails or other written correspondence to and from Ms. Backus underscores the inadequacy of the agency’s search methodology.

23. The FOIA Appeal highlighted additional evidence of NLM’s inadequate search; namely, NLM’s failure to produce all emails and documents from Ms. Rebecca Stanger, a journal publisher liaison at NLM. The agency produced an agenda referencing Ms. Stanger circulating “a letter to notify [the journals] of deselection” that she drafted titled “2017 deselected draft letter,” and she invited edits from others. But the letter and associated emails were not included in the FOIA production. Any reasonably adequate search would have captured that letter and those emails.

24. Finally, the FOIA Appeal notes NLM’s failure to produce emails from all relevant time periods. There is a conspicuous gap in emails between April 2017 and the June 22-23, 2017 LSTRC meeting, even though another part of the production suggests that the “agency continued to actively discuss the upcoming LSTRC review of journals, including *Oncotarget*” during that period. The agency also failed to produce any emails after it notified *Oncotarget* of its removal from MEDLINE in August, despite numerous emails between Impact Journals and NLM, all of which would have been responsive to an adequate search, including connected internal emails discussing the agency’s response.

25. Impact Journals, through counsel, attempted to contact Defendant multiple times by phone, email, and letter, regarding its FOIA Appeal. To date, Impact Journals has not received any response regarding the FOIA Appeal (apart from the February 28, 2019 Acknowledgment). Defendant has not responded to the FOIA Appeal as required by FOIA and

the HHS FOIA regulations.

26. Defendant's inadequate search and resulting flawed production unlawfully obstructs Plaintiff's right to access public agency records.

PLAINTIFF'S CLAIM FOR RELIEF

27. Plaintiff re-alleges and incorporates by reference all preceding paragraphs.

28. Plaintiff submitted the FOIA Request and Appeal under and in compliance with applicable HHS regulations.

29. Defendant possesses and has control of, or has a right to obtain, the documents requested in the FOIA Appeal.

30. The requested records are not exempt from disclosure, and Defendant has not claimed any exemption from disclosure under any paragraph of 5 U.S.C. § 552(b).

31. Plaintiff has a statutory right to receive a determination from Defendant as to its FOIA Appeal within the time required by FOIA and to promptly receive any responsive records.

32. Defendant violated FOIA by failing to make the required response to Plaintiff's outstanding FOIA Appeal and failing to produce any records subject to that appeal.

33. Defendant's failures harmed, and continues to harm, Plaintiff by forcing it to expend resources to obtain records that Defendant had, and has, a duty to promptly disclose.

REQUESTED RELIEF

WHEREFORE, Plaintiff requests the Court enter judgment in favor of Plaintiff, and award Plaintiff the following relief:

a. A declaration under 28 U.S.C. § 2201 declaring Defendant's failure to produce a complete response to a lawful FOIA Request violates 5 U.S.C. § 552(a);

b. A declaration under 28 U.S.C. § 2201 declaring Defendant's failure to respond to

Plaintiff's Appeal within twenty working days violates 5 U.S.C. § 552(a);

c. An order requiring Defendant to immediately and fully process Plaintiff's FOIA Appeal and produce responsive documents expeditiously;

d. An order awarding Plaintiff its costs and attorneys' fees under 5 U.S.C. § 552(a)(4)(E);

e. An order retaining jurisdiction of this action to ensure Defendant does not wrongly withhold agency records; and

f. Such other and further relief as this Court deems just and proper.

Dated: November 27, 2019

Respectfully submitted,

SQUIRE PATTON BOGGS (US) LLP

/s/ Jeremy W. Dutra

Jeremy W. Dutra (Bar No. 488130)

2550 M Street, NW

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(202) 626-6600

jeremy.dutra@squirepb.com

Counsel for Impact Journals LLC

EXHIBIT A



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Mimi Brouillette
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mimi.brouillette@squirepb.com

November 5, 2018

Via Email at nhlbifoiarequest@nhlbi.nih.gov

National Library of Medicine (NLM)
Marianne Manheim
Room 6054
6705 Rockledge Dr.
Bethesda, MD 20817

**RE: Freedom of Information Act
Request for Information regarding LSTRC Review**

Dear Ms. Manheim,

We represent *Oncotarget*, and we request records under the Freedom of Information Act, 5 U.S.C. § 552, and the Department of Health and Human Services Freedom of Information Regulations, 45 C.F.R. § 5. At your earliest convenience, please provide to us the records described below in the possession or control of the National Library of Medicine ("NLM"), at the National Institutes of Health.

Background for request:

On August 7, 2017, the NLM notified *Oncotarget* that the Literature Selection Technical Review Committee ("LSTRC") had reviewed *Oncotarget* and recommended to deselect the journal from MEDLINE and PubMed Central. See Exhibit 1.

Upon information and belief, LSTRC reached its recommendation to deselect *Oncotarget* during a meeting held on June 22-23, 2017. Minutes of this meeting is attached as Exhibit 2.

44 Offices in 21 Countries

Squire Patton Boggs (US) LLP is part of the international legal practice Squire Patton Boggs which operates worldwide through a number of separate legal entities.

Please visit squirepattonboggs.com for more information.

010-8692-5731/1/AMERICAS

Requested documents:

Please provide copies of the following documents relating to LSTRC's review and recommendation, and NLM's decision, to deselect *Oncotarget* from MEDLINE:

1. **Aside from the LSTRC Journal Review Summary for *Oncotarget* that was attached to the August 7, 2017 letter, any written communication(s) (e.g., letters or emails) from LSTRC to NLM regarding its recommendation to deselect *Oncotarget*.**
2. **Aside from the LSTRC Journal Review Summary of *Oncotarget* that was attached to the August 7, 2017 letter, any document(s) (e.g., letters, emails, or memorandum) from LSTRC regarding how it derived at *Oncotarget*'s numeric overall rating score of 3.5.**
3. **The minutes from the June 2017 meeting noted LSTRC members completed Conflict of Interest Forms at the beginning of the meeting and "members absent themselves from the meeting when [LSTRC] is discussing journal titles in which a conflict of interest might occur." See Exh. 2, at 1 n.1 and 2. Please provide any document(s) (e.g., Conflict of Interest Forms) relating to LSTRC member's potential conflict of interest during the June 2017 meeting.**
4. **Aside from the LSTRC Journal Review Summary of *Oncotarget* that was attached to the August 7, 2017 letter, any document(s) (e.g., minutes of meeting or recordings) relating to LSTRC's review and discussion of *Oncotarget* during the portion of the meeting closed to the public¹ when the recommendation to deselect *Oncotarget* was made.**
5. **Any document(s) (e.g., letters, emails, or memorandum) LSTRC or NLM maintains regarding its selection or deselection decision of *Oncotarget* from MEDLINE/PubMED.**

Please provide copies of the following documents relating to LSTRC's review of journals currently indexed to MEDLINE:

6. **Any document(s) (e.g., manuals or instructions) regarding when and how LSTRC decides to review currently indexed MEDLINE journals.**

¹ The minutes of meeting from the June 2017 LSTRC meeting cited 5 U.S.C. § 552b(c)(9)(B) in support of closing a portion of the meeting to the public. Section 552b(c)(9)(B) prevented **premature** disclosure of information. Here, the agency has "already disclosed to the public the content or nature of its proposed action," which was to deselect *Oncotarget* from MEDLINE. 5 U.S.C. § 552b(c)(9)(B). Thus, section 552b(c)(9)(B) supports the disclosure of the requested information.

7. Any document(s) (e.g., manuals or instructions) regarding how LSTRC classifies currently indexed MEDLINE journals as having “technical errors in machine readable files.”
8. Any document(s) (e.g., manuals or instructions) regarding how LSTRC and its members should assign the overall rating score during a journal review.

Response details:

- Any assertions of privilege. Should NLM contend that the contents of any of these documents are privileged, please provide redacted copies showing all information as to which there is no basis to assert privilege.
- Notice of your intent to comply. As is required by 45 C.F.R. § 5.35, we ask that NLM determine, and notify us within 10 business days after the receipt of this request, whether it will comply with the request.
- Expense/burden. We are willing to reimburse NLM up to \$500.00 for expenses incurred in responding to this request. Please promptly telephone or email me, if you anticipate that the amount will exceed \$500.
- Format. We would prefer that you produce the records responsive to this request by e-mail or on a disc.

Please do not hesitate to call me at (303) 894-6157 if you have any questions or need additional information.

Very truly yours,

/s/ Mimi Brouillette

Mimi Brouillette

Squire Patton Boggs (US) LLP

EXHIBIT B



DEPARTMENT OF HEALTH & HUMAN SERVICES

National Institutes of Health
National Library of Medicine
FOIA/PA Office, RKL 1, Suite 6054
6705 Rockledge Dr. MSC 7957
Bethesda MD 20892-7957

January 14, 2019

Mimi H. Brouillette
Squire Patton Boggs, LLP
1801 California Street, Suite 4900
Denver, CO 80202

Re: FOIA Case Number: 19-FOI-00053-NLM; NIH Case Number: 48587

Dear Ms. Brouillette:

This is our final response to your Freedom of Information Act (FOIA) request addressed to the National Library of Medicine (NLM), National Institutes of Health (NIH), dated November 5, 2018 and received November 6, 2018. You requested copies of the following, aside from the LSTRC Journal Review Summary for Oncotarget that was attached to the August 7, 2017 letter: 1) any written communication(s) from LSTRC to NLM regarding its recommendation to deselect Oncotarget, 2) any document(s) from LSTRC regarding how it derived at Oncotarget's numeric overall rating score of 3.5, 3) any document(s) relating to LSTRC member's potential conflict of interest during the June 2017 meeting, 4) any document(s) relating to LSTRC's review and discussion of Oncotarget during the portion of the meeting closed to the public when the recommendation to deselect Oncotarget was made, 5) any document(s) LSTRC or NLM maintains regarding its selection or deselection decision of Oncotarget from MEDLINE/PubMed, 6) any document(s) regarding when and how LSTRC decides to review currently indexed MEDLINE journals, 7) any document(s) regarding how LSTRC classifies currently indexed MEDLINE journals as having "technical errors in machine readable files," and 8) any document(s) regarding how LSTRC and its members should assign the overall rating score during a journal review. In an email with me on December 31, you agreed to exclude the names of other journals from the request.

In response to items 1 and 2, attached are individual reports from the two LSTRC members to NLM. The LSTRC is a committee under the Federal Advisory Committee Act (FACA) (6 pages). In response to item 3, attached are Conflict of Interest signature sheets of June 2017 LSTRC participants (14 pages). The remaining parts of the forms are maintained under a government-wide Privacy Act system of records established in response to the directive in the Ethics in Government Act, 5 USC App. §§ 101-505, that precludes the release of confidential financial disclosure forms and any information they contain. See section 107 and the implementing regulations at 5 CFR §§ 2634.604(b) and 2634.901(d). In response to item 4, attached is the MEDLINE Review Application Form which is provided by NLM staff to the LSTRC reviewers (5 pages). In response to item 5, attached are relevant emails, records, and event logs contributing to the decision for selection or deselection of *Oncotarget* in MEDLINE (22 pages). In response to items 6 and 8, attached are the LSTRC Journal Review Guidance and the Fact Sheet on MEDLINE Journal Selection (available at www.nlm.gov/lstrc/jssel.html) (15 pages). The following information on scoring is included in the "LSTRC Journal Review Summary," which was attached to the August 7, 2017 letter

sent to *Oncotarget*: “Rating scores range from 0 to 5. Currently, a journal must receive a score of 3.75 or greater to be recommended for indexing. The LSTRC assessment of journals is based on several critical elements that serve as a general guide for recommending a journal title to be indexed in MEDLINE. There is no one element by itself that tends to disqualify a journal from being recommended. The overall appraisal of a journal’s scientific content, quality, importance, editorial policies, and subject coverage in MEDLINE determine the LSTRC scoring and recommendation.”

In response to item 7, the LSTRC reviews the journal for scientific merit of a journal's content. The committee does not determine technical issues, and therefore there are no responsive documents. While we believe that an adequate search of appropriate files was conducted for the records you requested, you have the right to appeal this determination that no records exist which would be responsive to part of your request. Should you wish to do so, your appeal must be sent within ninety (90) days of the date of this letter, following the procedures outlined in Subpart F of the HHS FOIA Regulations <https://www.federalregister.gov/documents/2016/10/28/2016-25684/freedom-of-information-regulations>) to:

Assistant Secretary for Public Affairs/Agency Chief FOIA Officer
U.S. Department of Health and Human Services
Office of the Assistant Secretary for Public Affairs
Room 729H
200 Independence Avenue, S.W.
Washington, DC 20201
FOIARequest@hhs.gov
FAX: 202-690-8320

Clearly mark both the envelope and your letter “Freedom of Information Act Appeal.”

Please feel free to call me on 301-496-9737 for additional information or to inquire about your request.

If you are not satisfied with the processing and handling of this request you may contact the NLM FOIA Public Liaison and/or the Office of Government Information Services (OGIS):

NLM FOIA Public Liaison

Marianne Manheim

Rockledge I, Suite 6054
6705 Rockledge Drive
Bethesda, MD 20892
301-496-9737 (phone)
301-402-3604 (fax)
marianne.manheim@nih.gov (email)

OGIS

National Archives and Records
Admin.
8601 Adelphi Rd – OGIS
College Park, MD 20740-6001
202-741-5770 (phone)
1-877-684-6448 (toll-free)
202-741-5769 (fax)
ogis@nara.gov (email)

Page 3 - Re: FOIA Case Number: 19-FOI-00053-NLM; NIH Case Number: 48587

In certain circumstances provisions of the FOIA and Department of Health and Human Services FOIA Regulations allow us to recover part of the cost of responding to your request. Because the cost is below the \$25 minimum, there is no charge for the enclosed materials.

Sincerely,

A handwritten signature in blue ink, appearing to read "Valery Gheen".

Valery Gheen
Government Information Specialist, NLM

Enclosures - 62 pages

EXHIBIT C



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February 27, 2019

VIA FEDERAL EXPRESS Tracking No. 7857 3694 9883
AND VIA EMAIL FOIARequest@hhs.gov

Assistant Secretary for Public Affairs/
Agency Chief FOIA Officer
U.S. Department of Health and Human Services
Office of the Assistant Secretary of Public Affairs
Room 729H
200 Independence Avenue, S.W.
Washington, D.C. 20201

RE: Freedom of Information Act Appeal
Request for Information regarding LSTRC Review
FOIA Case No: 19-FOI-00053-NLM; NIH Case Number: 48587

Dear Agency Chief FOIA Officer,

I represent Oncotarget, and I submit this Freedom of Information Act ("FOIA") appeal pursuant to 45 C.F.R. §§ 5.61-5.64.

On November 5, 2018, I submitted a request for information pursuant to FOIA, 5 U.S.C. § 552, and the Department of Health and Human Services Freedom of Information Regulations, 45 C.F.R. §§ 5.21-5.29. *See* Ex. A (the "Oncotarget FOIA Request"). The agency assigned to this request FOIA Case Number 19-FOI-00053-NLM and NIH Case Number 48587. On January 14, 2019, the agency issued its final response, along with 62 pages of documents¹ (the "FOIA Production"). Concrete evidence exists that the agency's responses and production to several items from the Oncotarget FOIA Request are incomplete.

¹ The FOIA Production did not contain internal Bates numbering. Thus, the page number referenced herein corresponds to the pdf page number as produced by the agency.

February 27, 2019

1. Agency's Response to Items 1 and 2

In response to items 1 and 2, the agency produced “individual reports from the two [Literature Selection Technical Review Committee (“LSTRC”)] members to NLM.” However, public records indicate that eleven LSTRC members were present during the June 22-23, 2017 meeting, during which the members recommended deselecting Oncotarget from MEDLINE. *See* Ex. A, at Ex. 2. Thus, reports from the other LSTRC members and/or written communications regarding these reports are responsive and must be produced.

Further, the agency failed to produce anything that reconciles the ratings assigned in the individual reports with those in the LSTRC – Journal Review Summary as attached to the August 7, 2017 letter, in which NLM notified Oncotarget of LSTRC’s recommendation to deselect the journal from MEDLINE. *See* Ex. A, at Ex. 1. Thus, to the extent additional documents exist to support the final rating in the August 2017 letter, they are responsive and must be produced.

2. Agency's Response to Item 5

The agency produced several emails, records, and event logs in response to Oncotarget’s item 5, “[a]ny document(s) (*e.g.* letters, emails, or memorandum) LSTRC or NLM maintains regarding its section or deselection decision of Oncotarget from MEDLINE/PubMED.” The agency’s response and production are incomplete in three categories.

a. The agency failed to produce emails from all relevant time periods

The agency’s FOIA Production included emails from August 1, 2016 to April 5, 2017. The agency failed to include any emails, records or event logs from as early as 2010, when Oncotarget was first selected for indexing in MEDLINE. A specific example of the agency’s failure is an event log produced in the FOIA Production that expressly mentioned communication from August 7, 2014, noting “[r]esponse to publisher questions received.” FOIA Production at 31. However, the FOIA Production failed to include any documents from 2014. Further, the gap in emails between April, 2017 and the June 22-23, 2017 LSTRC meeting is also suspect. While the LO/PMC Journal Review Team Agenda from May 18, 2017 suggests that the agency continued to actively discuss the upcoming LSTRC review of journals, including Oncotarget, *id.* at 45, no emails have been produced between April 5, 2017 and the June LSTRC meeting.

The most glaring evidence that the agency’s response to item 5 is categorically incomplete is the fact that the FOIA Production failed to include any emails post-dating the August 7, 2017 letter, in which NLM notified Oncotarget that LSTRC had recommended to deselect Oncotarget from MEDLINE and PubMed Central. Following the August 2017 letter, Oncotarget exchanged numerous emails with NLM, all of which are responsive to item 5 but not produced. *See e.g.* email from Zoya Demidenko, (Publisher of Oncotarget), to Patricia Brennan (Director, NLM) and Jerry Sheehan (Deputy Director, NLM), (Jan. 8, 2018, 12:45 pm) (on file with author); email from Patricia Brennan, to Zoya Demidenko, Joyce Backus (Associate Director for Library Operations, NLM), and Jerry Sheehan (Jan. 8, 2018, 1:45 pm) (on file with Ms. Demidenko) (attached as

February 27, 2019

Ex. B). NLM's internal emails in connection with these emails from Oncotarget are also responsive and must be produced.

b. The agency failed to produce any emails to and from Ms. Joyce Backus

Ms. Backus is the Associate Director for Library Operations at NLM and the Designated Federal Officer for LSTRC, as required under 5 U.S.C. App. § 10(e). Ms. Backus signed the August 2017 deselection notice to Oncotarget. Further, Ms. Backus was present at the June 22-23, 2017 LSTRC meeting and all of the LO/PMC Journal Review Team meetings during the months leading up to the June 2017 LSTRC meeting. *See* FOIA Production, at 45-46. Indeed, Ms. Backus, along with Ms. Rebecca Stanger whose emails were partially produced, led a discussion of "MEDLINE titles going to June LSTRC meeting for possible deselection" during the May 2017 LO/PMC Journal Review Team meeting. *Id.* at 45 ("4 MEDLINE titles that are also in PMC will go to LSTRC June meeting for re-review. . . [including] Oncotarget. . .").

Finally, Ms. Backus's personal knowledge of, and her deep and continued involvement in, the 2017 decision to delist Oncotarget is evidenced by an October 2017 interview Ms. Backus gave on the subject. *See* "Widely Used U.S. Government Database Delists Cancer Journal," <https://retractionwatch.com/2017/10/25/widely-used-u-s-government-database-delists-cancer-journal/> (last accessed Feb. 27, 2019); *see also* Ex. B (stating, in January 2018, that Ms. Brennan will speak to Mr. Sheehan and Ms. Backus about Oncotarget's email that cited the same interview). Because Ms. Backus was heavily involved in Oncotarget's deselection determination, her emails and other written documents on this matter are responsive and must be produced.

c. The agency failed to produce all relevant emails and documents from Ms. Rebecca Stanger

Ms. Stanger is a journal publisher liaison at NLM. Like Ms. Backus, Ms. Stanger was present at the June 22-23, 2017 LSTRC meeting, as well as all the LO/PMC Journal Review Team meetings during the months leading up to the June 2017 LSTRC meeting. *See* FOIA Production, at 45-46. The agency admits that emails from Ms. Stanger are relevant and responsive, and the FOIA Production included two email threads from Ms. Stanger's email account. *See* FOIA Production, at 26-28. However, concrete evidence exists that the agency has failed to produce all responsive emails and documents from Ms. Stanger.

The agency's production of responsive emails and documents from Ms. Stanger suffers the same temporal gaps as noted in subsection (a) above. In addition, specific evidence of the incomplete production exists. For example, the July 27, 2017 LO/PMC Journal Review Team agenda noted that Ms. Stanger provided a summary of the June LSTRC committee meeting and circulated "a letter to notify [the journals] of deselection." *See* FOIA Production, at 46. Ms. Stanger drafted the letter, titled "2017 deselected draft letter," and invited edits from others. *Id.* This letter was not produced in the FOIA Production. Additional emails and documents from Ms. Stanger discussing Oncotarget are responsive and must be produced.

Squire Patton Boggs (US) LLP

February 27, 2019

Because concrete evidence exists that the agency's FOIA Production pursuant to the Oncotarget FOIA Request is incomplete, I request that the agency promptly produce all responsive documents. Please contact me at (303) 894-6157 if you have any questions or need additional information.

Very truly yours,

/s/ Mimi Brouillette

Mimi Brouillette

Squire Patton Boggs (US) LLP

EXHIBIT D



Division of FOIA Services
Office of the Secretary
Assistant Secretary for Public Affairs
Washington, D.C. 20201

February 28, 2019

Appeal Case No. 19-0045-AA

Mimi Brouillette
Squire Patton Boggs (US) LLP
1801 California Street Suite 4900
Denver, CO 80202

Dear Ms. Brouillette:

This acknowledges receipt of your Freedom of Information Act (FOIA) appeal received by this office on the date above. Your appeal has been assigned the above-stated case number based on when it was received in this office. Please reference this number on your correspondence.

Your letter is summarized below:

Appealing to NIH adequacy search regarding the following request: FOLA case No: 19-FOI-00053-NLM; NIH Case Number: 48587.

Pursuant to 45 CFR 5.35 (c) your appeal falls under “unusual circumstances” in that our office will need to consult with another office or agency that has substantial interest in the determination of the appeal. The actual processing time will depend on the complexity of the issues presented in the appeal and consultation with other U.S. Department of Health and Human Services (HHS) components involved. For more information about how your appeal will be processed please see 45 CFR 5.34 <http://www.hhs.gov/foia/45cfr5.html>

The FOIA and the HHS FOIA regulations are available at the following web addresses: <http://www.justice.gov/oip/doj-foia-regulations> and <http://www.hhs.gov/foia/45cfr5.html>.

Any questions regarding the status of your appeal should be directed to this office by calling (202)-260-6933, or write to us at the address above.

Sincerely,

Glenn Voelker